In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1356

HARRY SUGARMAN, PETITIONER

v.

JACK B. FORBRAGD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM WITH RESPECT TO MOOTNESS

This proceeding involves a civil action brought by petitioner to require the Food and Drug Administration to permit certain damaged coffee beans to be imported into the United States and used as food in the production of blended coffee. As petitioner has advised this Court, following the decision of the court of appeals below, petitioner sold the coffee beans as a food and they were re-exported from the United States. Thus, the cause has now become moot.

The facts, which are set forth in detail in the opinion of the district court (267 F. Supp. 817), may be

briefly summarized. The coffee beans were being transported from Colombia to Japan when a fire broke out on the ship requiring it to enter a distress port at Long Beach, California. There it became necessary to flood the beans with water because of spontaneous heating and smoking.

Shortly thereafter, petitioner and three others purchased the damaged coffee beans as salvage for $600. Petitioner then submitted the beans for import. The Food and Drug Administration obtained a sample of the beans and determined, after laboratory analysis and tests, that the beans were "unfit for food, since beverage made from it after roasting is nearly devoid of flavor and color characteristics of normal coffee." Pursuant to 21 U.S.C. 381(a) (set forth at Pet. App. A), a hearing was held at which petitioner was given the opportunity to present any evidence relating to the importability of the beans. After extensive correspondence the F.D.A. adhered to its determination that the beans could not be imported for use in blended coffee.

Petitioner then commenced the present action in the United States District Court for the Northern District of California to compel the F.D.A. officers to permit importation of the beans for use in blended coffee. Petitioner contended that the Administrative Procedure Act required the F.D.A. to hold an adversary hearing to establish the basis for its decision rather than the informal hearing contemplated by 21 U.S.C. 381(a). The district court held that the Administrative Procedure Act did not apply, since the matter was intended by Congress to be "committed to agency dis-

cretion by law" under 5 U.S.C. 701. 267 F. Supp. 817. The court of appeals affirmed. 405 F.2d 1189.

Petitioner filed a timely petition for a writ of certiorari in this Court on May 5, 1969. At about the same time, petitioner submitted a "Memorandum . . . Advising on the Issue of Mootness" in which he stated that after the decision below, he "sold the coffee beans as a food and they were re-exported from the United States."

Although petitioner apparently does not concede that the case is moot, it is clear that his action in selling and re-exporting the coffee beans has rendered wholly academic the issue he seeks to present concerning the type of procedures to be followed by the F.D.A. in making an import determination under 21 U.S.C. 381 as to the beans here involved. See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324. The petitioner seeks only an advisory opinion; there is now no case or controversy before the Court.

Relying on *United States* v. *Munsingwear*, 340 U.S. 36, petitioner requests that, if the cause is deemed moot, certiorari be granted and the case remanded with directions to vacate the judgment. We question the propriety of such a disposition in this case.

In *Munsingwear* and *A. L. Mechling Barge Lines, Inc.* v. *United States, supra*, this Court indicated that where a party is unable to pursue his right to have an adverse decision reviewed because of intervening mootness the reviewing court should vacate the judgment below. This was done in order to safeguard the interest which the parties in those cases had in avoid-

ing the effect of the doctrine of collateral estoppel. Here, however, the mootness was caused entirely by the voluntary action of petitioner, the party seeking vacation of the judgment. In addition, petitioner is unable to show any concrete likelihood that the instant judgment will be used against him in a pending or subsequent proceeding. Thus the principle sought to be implemented by the procedure of vacating the judgment below lacks a factual basis here.

We recognize that the courts of appeals have applied *Munsingwear* and *Mechling Barge Lines* in talismanic fashion so as customarily to vacate the judgment of the tribunal below in any case in which the controversy has become moot. And in *Cozart* v. *Wilson*, 352 U.S. 884, this Court employed the same procedure, without objection by the parties, in a case where no interest in avoiding the effects of collateral estoppel remained to be vindicated.

In our view, however, where no substantial interest in safeguarding the losing party's right not to have the decision below used against him as res judicata or collateral estoppel exists, the procedure of vacating the judgment below results in the unnecessary destruction of precedent. That disposition seems particularly inappropriate in this case because it was petitioner himself who caused the case to become moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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